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No. 09-23

Supreme Court, U.S.
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In The

Supreme Court of the United States

RICHARD A. SMITH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

REPLY BRIEF FOR RICHARD SMITH

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ARGUMENT

In citing to *Estelle v. McGuire*, 502 U.S. 62 (1991), the government contends that the jury instructions, taken as a whole, "raise no legal issue of broad significance." Br. Opp. 11. In so doing, the government implicitly claims that there was no harmless error associated with the jury instructions (despite admitting that the Tenth Circuit failed to instruct the jury as to a material fact adduced at trial, i.e., that the corporate president and majority shareholder each infused large sums of capital into the failing business by personally guaranteeing SBA loans, while the Petitioner did not). Br. Opp. 11. Harmless error analysis has been a part of *Estelle*'s application since the decision was rendered. *E.g.*, *United States v. Edmonds*, 80 F.3d 810, 823 (3rd Cir. 1996).

Because the Federal common law has considered a variety of indicia to determine liability under 26 U.S.C. § 6672, a totality of circumstances legal standard has been applied. *E.g.*, *Smith v. United States*, 555 F.3d at 1158, 1165 (10th Cir. 2009). There was no harmless error associated with *Smith*'s jury instructions only if they collectively did not mislead or confuse the jury. *Toth v. Grand Trunk R.R.*, 306 F.3d 335, 351 (6th Cir. 2002); *see Chapman v. California*, 386 U.S. 18, 23, 87 S.Ct. 824 (1967).

It is clear that the jury instructions misled the jury in a material way. It is axiomatic to say that fundamentally fair jury instructions require a jury to

apply material facts to a correct statement of the law. *See Estelle v. McGuire*, 502 U.S. 62, 72-75 (1991). However, in this instance, the instructions collectively not only failed to guide the jury as to why certain facts were material, e.g., on the infusion of capital issue, they also misstated the law as to the relevance of having the final say to determine which creditor should be paid and when.[1] Thus, *Smith* stands in conflict with the other federal courts as to whether the plain error standard should apply when a court arbitrarily fails to require a jury to consider material facts associated with liability.

The problem with *Smith*'s jury instructions is egregious. Indeed, the instructions, taken as whole, failed to inform the jury as to how these material facts adduced at trial were relevant for liability: (1) stock ownership (only Woodruff Family members were) (*Denbo v. United States*, 988 F.2d at 1029, 1032 (10th Cir. 1993); (2) directorship (only Woodruff family members and the bookkeeper were, while the Petitioner was not (*id.*); (3) the ability to sign tax returns (Mark Woodruff had this authority, while the Petitioner did not) (*id.*); and, (4) the infusion of capital into a failing business by persons who had a

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[1] Jury instruction No. 21 implied that this factor for liability was irrelevant. *Taylor v. International Revenue Service*, 69 F.3d 411, 415 (10th Cir. 1995) cites to other circuits by way of dictum in stating that the so called "final say" doctrine is not dispositive as to liability. However, *Taylor* never stated or implied that the "final say" doctrine was irrelevant in determining liability, as instruction No. 21 does.

financial stake in the businesses success.[2] *Denbo*, 988 F.2d at 1032; *Taylor*, 69 F.3d at 415. Additionally, all of the above indicia are ones which the Tenth Circuit has considered as relevant in the past for liability. Where as here, a totality of circumstances standard is used for jury instructions rather than a precise legal standard, failure to require the jury to consider material evidence on four, common law indicia is not only non-harmless error – it is perhaps even structural error. *See Neder v. United States*, 527 U.S. 1, 10, 119 S.Ct. 1827, 1834 (1999). Additionally, where as here, there is no defined national legal standard for liability, there is always a danger that the factors associated with liability will not only continue to evolve under the common law, but will be applied in an arbitrary or imprecise fashion.

Secondly, the disjunctive nature of instruction No. 20, i.e., liability occurs in one of three ways, one of which is the power to determine whether any creditor should be paid, is analogous to a special verdict interrogatory. That is, if the jury determined that the Petitioner wrote checks unilaterally in smaller amounts (which he did), then the jury was required to not consider the totality of the other material facts, and find the Petitioner liable per se.

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[2] The trial court also refused to provide the jury with the Petitioner's proposed instruction pertaining to how the power structure in a closely-held corporation works.

See E.E.O.C. v. Manville Sales Corp., 27 F.3d 1089, 1097 (5th Cir. 1994). Thus, the instructions could not have been considered as a whole by the jury. *Id.* Under this analysis, *Smith* presents a second, material split with the other circuits as to how the harmless error standard should be applied, because it requires liability through the use of a de facto special verdict interrogatory.

The government contends that other language in instruction No. 20 guided the jury to consider all of the material facts of the case. Br. Opp. 10. However, the government's response is cursory, and does not address the danger articulated in *Manville*, i.e. that a positive determination that the Petitioner had written smaller checks terminated the jury's inquiry as to the other material facts. *Id.* Therefore, the government's response is superficial.

Thirdly, there is some conflicting case law, albeit relatively minor, as to how the federal courts should apply the harmless error standard in a civil jury instruction context. A Ninth Circuit panel stated in 2000 that: (1) a less stringent review of civil jury instructions is required than for criminal instructions; (2) disputed facts should be resolved in favor of the losing party on appeal; and, (3) a more stringent review should be used than a sufficiency of the evidence standard. *Kennedy v. Southern California Edison Company*, 219 F.3d 988, 998 (9th Cir. 2000). *Kennedy* has not been followed by any other federal appellate court, nor has the Ninth Circuit explicitly overturned it. However, later Ninth Circuit panels

have held that jury instruction error warrants reversal only when it is more probable than not that a different result would have occurred if a correct instruction had been given. *E.g.*, *Head v. Glacier Northwest, Inc.*, 413 F.3d 1053, 1066 (9th Cir. 2005). Other minor variations exist in the federal appellate courts as to how to apply the plain error standard in a civil jury instruction context, e.g., *de novo* and abuse of discretion standards are both used. Nevertheless, a national standard for trust fund tax liability would eliminate this problem as well.

Lastly, the government contends that this Court should not consider the Petitioner's argument pertaining to jury instruction No. 21, pursuant to *City of Springfield v. Kibbe*, 480 U.S. 257, 259 (1987). Br. Opp. 11. However, *Kibbe* does not apply for the following reasons. In *Kibbe*, this Court did not consider a jury instruction issue because it had not been raised during the litigation, and because it lacked sufficient importance to the overall decision of the case. However, in this instance, the 10th Circuit relied heavily upon jury instruction No. 21 to hold that the instructions, taken as a whole, adequately presented the law to the jury. *Smith*, 555 F.3d at 1167. Thus, it is clear that consideration of jury instruction No. 21 has been raised, sua sponte, by the Tenth Circuit, and that it is central to the outcome of this case. Therefore, the government's argument regarding the relevance of *Kibbe* is misplaced.

CONCLUSION

The government's position that the jury instructions, taken as a whole, do not raise any issue of broad significance fails to consider the harmless error standard. *Smith*'s jury instructions stand as an example of how a court can arbitrarily choose which common law indicia to apply to find liability in the trust fund tax context without a national standard for liability. Thus, even assuming that the split in the federal courts regarding their varying use of indicia to determine liability is not large enough to warrant a grant of certiorari in and of itself, coupled with *Smith*'s disregard of *Chapman* in the civil jury instruction context, certiorari should be granted to address both of these serious problems.

RESPECTFULLY SUBMITTED this 10th day of September, 2009.

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